A. B. SMALL COMPANY *v.* AMERICAN SUGAR REFINING COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

No. 101. Argued October 22, 1924.—Decided March 2, 1925.

1. Written orders for goods, addressed to a sugar refiner, and written acceptances by the latter, compared and construed, in the light of the parties' conduct, and *held* free from variances alleged to prevent their forming completed contracts. P. 235.
2. In construing a typewritten document, a mistake of the typist by transferring the concluding clause of one sentence to the beginning of the next, thus altering the literal meaning, may be corrected to conform to the context and the sense of the whole and to the conduct of the parties. P. 236.
3. Section 4 of the Act of August 10, 1917, amended October 22, 1919, known as the Lever Act, which provides that it shall be "unlawful for any person wilfully . . . to make any unjust or unreasonable . . . charge in . . . dealing in or with any necessaries," or to agree with another "to exact excessive prices for

shipment was not to be made within thirty days. But no support can be derived from that regulation, for it was revoked January 26, 1919, prior to the making of these contracts.

In so far therefore as the special defenses were based on sections 5 and 6 and the regulations cited the demurrers were rightly sustained—and this regardless of any question respecting the validity of either of those sections or of any of the regulations.

A short statement of the case shown by the evidence, in so far as it is embodied in the record, will give a better understanding of the remaining questions.

By the contracts, made in July, 1920, the plaintiff agreed to deliver the sugar to a carrier at New Orleans during September, or soon thereafter, for shipment to the defendant at Macon, Georgia; and the defendant agreed to accept delivery to the carrier, to pay the contract price, and to bear the carrier's charges. In August the market price of sugar took a downward turn and continued to decline to the end of that year. In September the plaintiff made the delivery to the carrier as agreed; and in due course the sugar reached Macon. The defendant then refused to accept it and wrote to the plaintiff saying, "For the good of whom it may concern we suggest that this carload of sugar be stored to save any additional cost (demurrage, etc.) against whoever might be affected." The storage was effected as suggested with a Macon warehouseman, but was intended to be only temporary. Much correspondence ensued—the defendant repeating its refusal to take the sugar, and the plaintiff insisting the defendant was bound to take it and to bear the carrier's charges, etc. Finally, on November 30, the plaintiff sent to the defendant a notice saying, "As you have continued to refuse to take this shipment we must now inform you that unless you accept and pay for same at once we will resell this sugar for your account. When resale is made

we will require you to remit the difference between contract price and price received on resale, as well as for all freight, storage and other charges incurred." The defendant made no answer. The plaintiff then paid the several charges, took possession of the sugar and resold it in and around Macon—the last portion being sold December 20. There was an oversupply of sugar in the hands of wholesale dealers and others in that vicinity at the time, which made it difficult to effect a resale. But the plaintiff made an active and honest effort to make a fair sale and succeeded in obtaining the full market price prevailing in larger markets, plus the freight to Macon. The total amount realized, less storage and other charges not questioned, was $2,963.04. With this sum credited on the contract price there remained a balance of $5,111.70, which was demanded in the first count of the plaintiff's petition.

On the trial the defendant sought to prove by jobbers and dealers in Macon that the price of sugar at Macon was higher in October and November than in December, and that in December particular sales were made at a higher rate than the plaintiff obtained on the resale—the purpose in offering this testimony being to discredit the fairness of the resale by the plaintiff. A preliminary examination of the witnesses disclosed that the market at Macon was greatly demoralized during that period; that jobbers and dealers were selling for what they could get regardless of cost, lest they might lose more through a further decline; that the buying was in relatively small quantities and was on what was termed a "hand to mouth" plane; and that the particular sales in December were of such a character that they would shed no light on the fairness of the resale. On the plaintiff's objection, the court refused to permit the proffered testimony to go to the jury. Complaint is made of this ruling. In our opinion it constitutes no ground for a reversal. There were

obvious infirmities in what was proposed to be shown about the market price in October and November; but we need not dwell on them, because, as will be explained later on, the state of the market in those months came to be quite immaterial. What was proposed to be shown about particular sales in December was rightly excluded. The sales were of a kind that did not tend to establish a standard by which to judge the plaintiff's resale. Besides, the real question was not whether the plaintiff got the best possible price, or as much as others got in special instances, but whether the resale was fairly made in a reasonably diligent effort to obtain a good price. To have admitted the proffered testimony would have tended to confuse and mislead the jury.

At the trial the plaintiff took the position that when it delivered the sugar to the carrier at New Orleans its obligation under the contracts was fully performed and it became entitled to the contract price; that it could then have abandoned the sugar, but was not obliged to do so; that it had a vendor's lien thereon which could be availed of at any time before the sugar passed into the actual possession of the defendant; that it could realize on the lien by retaking the sugar and, after notice to the defendant, reselling the same for the latter's account and crediting the net proceeds on the contract price; and that it could recover the balance from the defendant. The District Court, in dealing with the first count of the petition, charged the jury to that effect—evidently believing it was conforming to Georgia statutes and decisions on the subject. No objection was made to that part of the charge nor was any exception taken to it; so we assume that it conformed to the local law and was applicable to the evidence. The court then proceeded to explain how that part of the charge should be applied, and in that connection said to the jury that if they believed from the evidence that the plaintiff retook possession under its vendor's lien,

they should next consider whether the resale was made within a reasonable time, and in doing so should take as the starting point November 30, when the plaintiff gave notice of its purpose to retake and resell, and should consider only the period between that date and December 20, when the resale was concluded. The defendant's counsel excepted to this, the terms of the exception being, "We except to the court fixing November 30 as the time from which a reasonable time should be figured. I construe the plaintiff as being always in possession." The defendant now insists the exception was well grounded. But we are of a different opinion. As the jury's verdict was for the plaintiff on the first count, they must have found that the plaintiff retook possession and made the resale under a vendor's lien. If it had such a lien under the law of Georgia—as we must assume in view of the unchallenged charge on that subject—the court plainly was right in saying the date when possession was taken under the lien was the starting point from which to reckon a reasonable time; and was also right in designating November 30 as that date. The suggestion in the exception that the plaintiff was "always in possession" had no support in the evidence set forth in the record, for it shows that the plaintiff surrendered possession to the carrier at New Orleans and was not again in possession until after the notice of November 30 was given declaring the plaintiff's purpose to take possession and sell. According to the Georgia statute, which the District Court applied, the plaintiff was entitled to take possession under its lien at any time before "actual receipt" of the sugar by the defendant. Parks Ann. Code, sec. 4132; *Branan* v. *Atlanta and West Point R. R. Co.*, 108 Ga. 70, 73. A duty to sell under the lien could not arise until possession was taken under it; and the reasonable time permitted for making a sale by way of realizing on the lien hardly would begin to run before.

What we have just said explains why the testimony offered respecting the state of the market at Macon in October and November, before the plaintiff took possession under the lien, became immaterial.

Judgment affirmed.